SUPREME COURT, U. S.

JAN 9 1967

JOHN F. DAVIS, CLERK

IN THE

United States Supreme Court

OCTOBER TERM, 1966

NO. 948

BOOKER T. DUKE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ROBERT H. VAN BRUNT,
233 Lemcke Building,
106 E. Market Street,
Indianapolis, Indiana 46204

PAUL H. FRAZIER,
315 Lemcke Building,
106 E. Market Street,
Indianapolis, Indiana 46204
Attorneys for Petitioner.

FERDINAND SAMPER,
703 First Federal Building,
11 N. Pennsylvania St.,
Indianapolis, Indiana 46204
Of Counsel.

Central Publishing Company, Inc., Indianapolis, Ind.

INDEX

	Page
Alphabetical List of Authorities Cited	ii
Judgment and Opinion of the Courts Below	2
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
Evidence	4
Statutes and Constitutional Provisions Involved	7
Reasons for Granting the Writ of Certiorari and Arguments Amplifying the Same	8
Conclusion	21
Appendix	1a - 10a

ALPHABETICAL LIST OF AUTHORITIES CITED

Cases

	Page
Beck v. Ohio, 379 U. S. 89	9
Cochran v. United States, 291 F 2d 633	16
Draper v. United States, 358, U. S. 307	12
Giordenello v. United States, 357, U. S. 480	7
Henry v. United States, 361 U. S. 98	9
Jones v. United States, (1960), 362 U. S. 257 4 L ed 2d 697	16
Mapp v. Ohio, 367, U. S. 643, 6 L ed 2d 1081	12
United States v. Di Re, 332 U. S. 581	16

IN THE

United States Supreme Court

OCTOBER TERM, 1967

NO. _____

BOOKER T. DUKE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable, Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, Booker T. Duke, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURTS BELOW

The judgment of the United States District Court for the Southern District of Indiana, Indianapolis Division, was entered on the 14th day of October, 1965, and appears in the record filed with and certified by the Clerk of the Court of Appeals and transmitted herewith.

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming the said judgment, was filed November 15, 1966, and is not yet reported but is set forth in the appendix hereto and in the certified copy of the record.

JURISDICTION

Appellant by Counsel filed his Petition for Rehearing on November 28, 1966. On the 7th day of December, 1966 the United States Court of Appeals for the Seventh Circuit denied Appellant's Petition for Rehearing. On December 9, 1966 Petitioner filed his Petition to Stay Issuance of Mandate in the United States Court of Appeals for the Seventh Circuit and the Court issued a stay of mandate until January 10, 1967. The jurisdiction of this Court is invoked under the rules of the Supreme Court of the United States under Part V (Jurisdiction on Writ of Certiorari), Rule 19 (b).

Likewise, the jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Were the Appellant's rights as contained in the Fourth and Fourteenth Amendments to the Constitution of the United States violated when he was searched without a

warrant and when there was no probable cause for the Appellant's arrest or the search and seizure?

2. Is an uncorroborated heresay statement from an informer enough to constitute probable cause to make an arrest and search?

3. Is it probable cause when the Government, in effect, concedes that the arresting officer did not have probable cause to arrest and search Petitioner until the Petitioner was seen and stopped upon the highway? (See page 2 of the Government's (Appellee's) brief.)

4. Were the Petitioner's rights violated under the Sixth Amendment to the United States Constitution when the Government failed to produce the informer at the trial and thus denying the Petitioner the right of confrontation and the right of cross examination?

5. Do the arresting officers have to immediately advise the accused (the Petitioner) of his right to remain silent and advise him that what he might say can be used against him, or can they wait and do this after admissions have been made by Petitioner.

6. Was there "probable cause" to justify a search and seizure when there was no showing by the Government of the reliability of the informer?

STATEMENT OF THE CASE

Petitioner was convicted by a jury on Count III of the indictment which charged that the Petitioner on or about October 15, 1964 did knowingly receive, conceal and facilitate the transportation and concealment of 163 grams, more or less, of heroin hydrochloride, a narcotic drug, which had been previously imported into the United

States contrary to law, knowing the same to have been unlawfully imported, in violation of Title 21, United States Code 174. Petitioner was found guilty and sentenced to a term of five years in prison.

EVIDENCE

The evidence briefly stated is as follows:

The defendant was arrested without a warrant for his arrest and he and his car were searched without a search warrant.

The arrest of the defendant was by a cycle or traffic officer of the Indianapolis Police force by the name of Wycliff Roland Gibson. He had been told by a narcotics officer, Richard A. Jones, at 10:30 A. M. or 11:00 A. M. on October 15, 1964 to stop the car the defendant was in.

The defendant was stopped and arrested and searched 3:10 P. M. on the same day, some 4 to 4-1/2 hours later.

The arrest was also made by an Indianapolis Police Officer of the Narcotics section, Richard A. Jones, who stated he made the arrest because he had information from an informer whose name was Emanuel Sims, and who was a drug addict.

Officer Jones testified he did not attempt to get a warrant for the arrest of the defendant.

The officer also testified *he had no other information to base this arrest on other than the information he got from the informer,* Emanuel Sims.

The officer later testified that he had observed a large amount of traffic in and out of the defendant's pool room and had heard rumors concerning the defendant. Officer

Jones testified in regard to the rumors in response to a question, by the attorney for the defendant, that this was a suspicion, not probable cause and he answered that was right.

The following questions were asked of Officer Jones by the defense attorney Charles A. Walton on pages 56 and 57 of the transcript, and these answers were given:

"Q How many other arrests have you made as a result of the information give you by Emanuel Sims?

"A Three or four.

"Q Have you ever arrested Emanuel Sims for being a drug addict?

"A Yes, sir.

"Q How many occasions?

"A One.

"Q On Direct examination you stated that immediately after you talked to Emanuel Sims you set up your surveillance.

"A Yes, sir; I put the process in motion immediately thereafter.

"Q You didn't make an arrest until after three o'clock, did you not?

"A That's correct.

"Q Did you try to find a magistrate in order to get a warrant for the arrest of Mr. Duke and Mr. Allen?

"A No, sir."

The traffic officer Gibson stated he stopped the car the defendant was in and in a matter of seconds the Narcotics officer pulled up behind the car he stopped.

Officer Gibson testified that he pulled the car the defendant was in over for speeding.

Gibson further testified that the only reason he stopped the car was because the other officers had told him to do so and then he retracted that statement on the court's questioning.

He also testified he would have stopped the car if it was going 25.

He stated the car was going 14 miles over the speed limit.

The defendant-appellant was arrested at about 3:00 P. M. and was returned to the Police Station and apparently booked at about 8:00 P. M. Officer Jones testified that from the time he arrested the defendant until the time he got him back to the police station 4-1/2 to 5 hours had elapsed.

All this time the defendant was without a lawyer. The defendant made a number of statements to Mr. Jones, before he ever talked to a lawyer.

Officer Jones, the Narcotics officer, testified he told traffic officer Gibson to stop the car defendant was in whether a traffic violation was being committed or not.

Officer Jones testified during the trial that he had tried to find the informer, Emanuel Sims, but couldn't find him.

Officer Gibson stated he was watching for the car defendant was in. That he was watching for a cream colored car.

There was no testimony that the defendant-appellant knew that the said narcotic drugs had been unlawfully imported into the United States contrary to law.

The trial court admitted into evidence, over defendant-appellant's objection, the said narcotic drugs seized from the defendant's car without a warrant.

At the hearing on defendant's motion for a new trial the informer, Emanuel Sims, who was not produced during the trial, testified that he did not even know the defendant, Booker T. Duke, and testified that he signed an affidavit that he did not tell Sgt. Jones that the defendant, Booker T. Duke, was going to Chicago to pick up narcotics.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The search incident to the arrest of the Petitioner violated the Petitioner's rights under the Fourth and Fourteenth Amendments of the United States Constitution. The Petitioner was found guilty of having violated Title 21, United States Code, Section 174.

The language of the Fourth Amendment to the United States Constitution that no warrants shall issue, but upon probable cause has been held to apply to arrest as well as search warrants. See: *Giordenello v. United States,* 357, U.S. 480.

The Petitioner's rights under the Fifth Amendment to the United States Constitution were also violated when he was not immediately told upon his arrest of his right to remain silent and not testify against himself as set out in the Fifth Amendment.

The Fifth Amendment to the Constitution provides: "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use."

The Petitioner's rights under the Sixth Amendment to the United States Constitution were also violated when the Government failed to produce the informer at the time of the trial.

The Sixth Amendment to the Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process of obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

REASONS FOR GRANTING THE WRIT OF CERTIORARI AND ARGUMENTS AMPLIFYING THE SAME

Certiorari should be granted because this decision in this case by the United States Court of Appeals for the Seventh Circuit is in conflict with the applicable decisions of the United States Supreme Court concerning federal

and constitutional questions, and for the further and separate reason that there are certain basic rights guaranteed by the Constitution of the United States that have never been passed on by this Court. It was urged in the Appellant's brief, and is urged now, that the officers neglect in failing to obtain a warrant violated the Petitioner's constitutional rights. It may be assumed in this case that the officers involved acted in good faith in arresting the Petitioner, but good faith on the part of the arresting officers has been held to be not enough. See: *Henry v. United States,* 361 U.S. 98.

In the instant case the Petitioner at the trial moved to suppress the evidence as being seized without a search warrant and without probable cause.

Undoubtedly the informer did relate information to the police which caused the Petitioner's arrest and search. When the constitutional validity of the arrest was challenged it was incumbent upon the prosecution to show more specifically why the officer thought the information from the informer was credible. See: *Beck v. Ohio,* 379 U.S. 89.

The United States Court of Appeals for the Seventh Circuit in the instant case ignores the findings in *Beck v. Ohio* (Supra).

Neither the Government nor the Seventh Circuit Court of Appeals dwelled on the alleged speeding of the vehicle in which the Petitioner was riding. Suffice to say that the police officer who stopped the car stated in substance that he would have stopped the car regardless of the speed involved. The Government's brief did not seriously dispute the contention of the Petitioner that the charge of speeding was a subterfuge. The record clearly indicates that the police officers were looking for this particular

car and were going to stop this particular car in any event. The Seventh Circuit Court of Appeals opinion does not even discuss the alleged speeding involved other than mentioning it in a brief statement of the evidence. The Appellate Court's entire opinion virtually revolves around the issue of probable cause and the issue of whether the Petitioner was fully advised of his right to an attorney and his right to remain silent.

There is no serious dispute that the officers waited around for the Petitioner to appear for approximately five hours. During this time there was no attempt by any of the officers involved to obtain an arrest warrant or a search warrant.

The Appellate's Court's opinion states that the officers had a solid basis for belief that the defendant and his companion might be returning to Indianapolis at any time. The record does not indicate there was any such solid basis as the police officers only had the heresay statement of an informer that the Petitioner had gone to Chicago.

The Appellate Court, in the opinion, took judicial notice that the distance from Chicago to Indianapolis and return was less than 400 miles, or about an eight hour drive. By using an eight hour time period the Court assumes, and we think incorrectly, that the Petitioner would immediately turn around after arriving in Chicago and return to Indianapolis. If the officers relied on the informer, as they stated, then the natural and logical assumption would be that the Petitioner would be in Chicago for at least some period of time in order to make the transaction which the informer stated was to occur. The time element is calculated on the basis that the officers received information from the informer at about 10:00 A. M. and the Petitioner's

arrest and search did not take place until 3:00 P. M. on the same day. It is also pertinent that according to the information furnished to the police officers by the informer that the Petitioner left Indianapolis for Chicago at 3:00 A. M. on the same day. Therefore, it is obvious that the officers had between three and four hours at the very least in which to obtain a warrant, which they did not attempt to do; even though the undisputed evidence is that the courts were open.

The Seventh Circuit Court's opinion in this case relies upon *Draper v. United States,* 358 U. S. 307, but in that case the record showed that a named special employee of the narcotics agents had on numerous occasions given *reliable information* to the said narcotics agents.

In this case, the informer had been arrested for being a drug addict by one Officer Jones. The informer then testified at a later hearing on the Petitioner's second motion for a new trial, under oath, that he never made the statements attributed to him to Officer Jones.

There was no showing by the Government or in the record that any of the past information furnished by the informer to Officer Jones, had proven to be reliable.

Officer Jones testified during the trial that he had made ficer Jones testified during the trial that he had made three or four arrests as a result of information given to him in the past by Emanuel Sims, the informer. But there was no testimony by him, or evidence submitted that the information given had proven reliable or whether the arrests had resulted in convictions. In other words, the entire record in this cause is completely void of whether the past information given by the informer, Emanuel Sims, had proven to be reliable. The mere statement by Officer Jones during the trial that he had made three or four

arrests as a result of information from Emanuel Sims did not in any way inform the jury or the court whether the information had proven to be reliable.

The opinion by the Appellate court fails to note this distinction as to whether the information given in the past had proven to be reliable. This is a vital and important distinction. The United States Supreme Court in *Beck v. Ohio,* 379, U. S. 89, 13 L ed 2d 142, 147 in referring to the Draper case stated:

> "* * * The respondent relies upon Draper v. United States, 358 U. S. 307, 3 L ed 2d 327, 79 S. Ct 329. But in that case the record showed that a named special employee of narcotics agents who had on numerous occasions given *reliable information* had told the arresting officer that the defendant, whom he described minutely, had taken up residence at a stated address and was selling narcotics to addicts in Denver.* * *" (Emphasis ours)

The Appellate court in this case begs this question when they merely cite in their opinion the fact that Officer Jones had made three or four arrests as a result of information furnished by the informer Sims. This court can take judicial notice that many bad arrests are made, and that the arrests made may not have resulted in convictions. It was incumbent upon the Government to show this past information had proven reliable as we read *Beck v. Ohio,* Supra. A mere arrest does not indicate that a person was guilty or did the things that he was arrested for.

At the trial, no search warrant or arrest warrant was produced by the Government, nor was the failure to produce one accounted for or explained. This the Government was obligated to do. See: *Mapp v. Ohio,* 367, U. S. 643, 6 L ed 2d 1081.

The informer, Emanuel Sims, made the following affidavit which was submitted with defendant's motion for a new trial, that he did not make the statements to Officer Richard Jones about the Defendant-Petitioner. Sims also testified at the hearing on the motion for a new trial that he did not even know the Petitioner during October of 1964.

"EXHIBIT A:

"TO WHOM IT MAY CONCERN:

"I, Emanuel Sims do voluntarily make this statement. During the month of October, 1964 at no time did I tell detective sergeant Richard Jones that Booker T. Duke and Richard Allen was going to Chicago to pick up a load of dope, nor did I tell any member of the police department anything concerning any dope or Booker T. Duke or Richard Allen during the month of October, 1964.

/s/ Emanuel Sims
Emanuel Sims

WITNESS:

/s/ Hawitt A. Washington
/s/ Walter Collins
/s/ Robert E. Durley

"Subscribed and sworn to before me this 23rd day of October, 1965.

Notary Public /s/ Leon Coleman
My Commission Expires February 5, 1968"

The Government in this cause is in an unusual position. They would have this court believe that the informer Sims was a reliable informer and worthy of belief when he makes certain unsworn heresay statements to Officer Jones, but at the same time they urge that his statements

and testimony be disregarded and disbelieved as unreliable when he signs a sworn affidavit and when he comes into court and gives testimony.

In other words, they say believe Sims when it is convenient for the Government and don't believe Sims when it helps the defendant. This inconsistency is hard to fathom. On one hand the Government says this is an informer who was reliable and worthy of belief, yet the Government failed to produce him at the trial and when he was later produced and testified, under oath, the Government in effect says don't believe this witness; he is unreliable. Thus on the one hand they say Sims is reliable, and on the other hand he is unreliable and not worthy of belief.

It may be that in some cases, as this court has often pointed out, that a person who has violated the law may go free, but our laws are for all people; and it is the law that sets him free. This court stated in *Mapp v. Ohio*, Supra:

> "* * * There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine '(t)he criminal is to go free because the constable has blundered.' People v. Defore, 242 NY, at 21, 150 N. E., at 587. In some cases this will undoubtedly be the result. But, as was said in Elkins, 'there is another consideration—the imperative of judicial integrity'. 364 U. S., at 222. The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws or worse, its disregard of the charter of its own existence. As Mr. Justice Brandeis, dissenting, said in Olmstead v. United States, 277 U. S. 438, 485, 72 L ed 944, 959, 48 S Ct 564, 66 ALR 376 (1928): 'Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people

by its example . . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.' "

See *Mapp v. Ohio* 367 U. S. 643, 6 L ed 2d 1081, 1092.

It must be remembered that it was Officer Richard A. Jones that the informer talked to; and that Officer Jones testified that he had no other information to base this arrest on other than the information that he received from the informer. Thus, the reliability and credibility of the informer is of paramount importance in this case as shown by the cases cited.

Officer Jones had made some bad arrests, or some good arrests, as a result of some past information from the informer. This we don't know. We are in the dark as to the outcome of the three or four arrests that Officer Jones had made based on information from the informer. Were these past cases thrown out, dismissed, lost, or won? Were the cases lost or thrown out because the information the informer supplied had proven unreliable?

One would tend to question the reliability of the informer when he testifies in court under oath that he didn't make the statements attributed to him by Officer Jones, and yet according to Officer Jones the statements had been made by the informer. The informer further testified at the hearing on the motion for a new trial that he had never given Detective Jones information in the past about anyone who was committing a crime. These inconsistent statements seem to make it quite clear that Sims was very unreliable. In order for the Government to properly sustain its position on probable cause the information given previously by the informer must have been shown to be reliable.

The court in *Jones v. United States,* 1960, 362 U. S. 257 4 L ed. 2d 697, again dealt with the question of "probable cause." The court pointed out that the information given previously by the informant had been accurate.

The United States Court of Appeals for the Eighth Circuit stated in *Cochran v. United States,* 291, F 2d 633, on page 737 (1961) the following:

> "* * * Here the primary question is not the informer's identity but his reliability or credibility as bearing upon the issue of probable cause. * * *"

This is the same issue in the Petitioner's case. The question is his reliability or credibility bearing on the issue of probable cause.

The guarantee of freedom from unreasonable search and seizure is construed as recognizing a necessary difference between search of a dwelling house or an automobile. However, those entitled to use the public highways have a right to free passage without interruption or search unless the seizing officer has "probable cause" for such search and seizure. See *United States v. Di Re,* 332 U. S. 581.

Where one who has knowledge of the facts and is not called by the prosecution as a witness in a criminal case, and is not shown to be unavailable it must be assumed that his testimony would not have been helpful to the prosecution. See *United States v. Di Re,* Supra.

While the informer was called to a later hearing on defendant's motion for a new trial the informer was not produced at the trial nor was there any valid explanation given why he was not available for the trial and produced at the trial. Also the court did not give the jury an instruction regarding this presumption.

One officer testified he looked for Sims but couldn't find him. Here the Government with all its resources couldn't locate this one witness, but he was easily produced at the hearing on the motion for a new trial.

This Court has never passed on the proposition that it is error to try a defendant for the possession of heroin when the informer to the Government, or to the officer, was unavailable as a witness. The United States Court of Appeals for the Second Circuit held that it was not error to try the defendants for selling heroin and for conspiracy while the Government informer was unavailable as a witness. However, Circuit Judge Waterman dissenting, held under the circumstances, it was error. See: *United States v. Cimino* (Joseph D'Ercole), 321, F 2d 509, 512.

In that case the Government took the position there was no duty to produce the informer as a witness. It appeared in that case, as in this case, that the Government made no real attempt to produce the informer as a witness. None of the federal agents who testified during the trial in the instant case stated that they made a search for the informer in order that he be a witness at the trial. One of the city police officers testified that he looked for the informer and could not find him. There was no indication that the Government even tried or attempted to get the informer to the trial as a witness in this case. Officer Jones, who testified on behalf of the Government, repeated certain statements the informer was alleged to have made to him, but at no time during the trial did the Defendant-Petitioner have the opportunity to cross examine the absent informer, or to confront the absent informer in violation of the Petitioner's constitutional rights under the Sixth Amendment to the United States Constitution.

Petitioner pointed out in his Petition for Rehearing that the Government had failed to produce the informer as a witness at the trial and thereby denying the Appellant-Petitioner of the consitutional right of confrontation of the witness.

The Petitioner did not have this point in the argument portion of his brief but pointed this fact out in his Petition for Rehearing and further pointed this fact out on Page 19 of the Appendix to Appellant's brief wherein the trial counsel, Mr. Walton, at the time of the trial made a motion to strike based in part on this lack of confrontation. Further a manifest error involving a violation of a constitutional right could be raised at any time. The Petitioner quoted the trial counsel in his brief to the United States Court of Appeals for the Seventh Circuit where the following statement was made:

> "This Defendant had the right to be confronted by his accuser, and the United States Government was unable to bring this Defendant's accuser to court, and the probable cause which they alleged they had for making the initial arrest rested solely on the alleged information given by this informant who is unavailable."

(See Page 19 of Appendix to Appellant's brief)

Further, in Petitioner's original motion for a new trial Petitioner moved for a new trial on the grounds that the verdict of the jury was contrary to the law and also on the grounds that the verdict of the jury was contrary to the evidence. While these are the general statements in a motion for a new trial they have been held to sufficiently cover a violation of one's constitutional rights. Also, these same matters were argued and heard during the hearings on the motions for a new trial. Also, the fact that the in-

former was not produced during the trial was mentioned in the argument before the United States Court of Appeals.

It may be that by producing the informer in Court that this would affect the informer system used by the Government in these types of cases. However, we believe that Judge Waterman's position is well taken where he states:

> "... It may further be suggested that a rule of evidence requiring the testimony of informers in criminal trials will adversely affect the entire informer system upon which the Government appears so heavily to rely in narcotics cases. I do not doubt that informers may be expected to resist any loss of the anonymity within which they operate. The evidentiary presumption which I believe to be applicable to this case, however, only arises in a limited few cases,—those cases where the informer is quite obviously better able to testify to the facts in issue than are alternative Government witnesses. Moreover, the Government's alternative evidence may often be, as in the case of appellant Cimino, sufficiently strong to withstand any unfavorable inference created by a failure to call the informer...."

See *United States v. Cimino*, 321 F. 2d 509 on page 517.

As stated heretofore, the Government's position in this case has mainly been on the theory of "probable cause" that the arrest and search were justified in the Government's opinion because of probable cause.

The arrest on the speeding charge in the instant case was for the purpose of search. The purpose of search was uppermost in the officers' minds. The speeding charge must be looked at suspiciously because the testimony of

the officers was that they were going to stop this car in any event. There is no doubt that they were going to search this car in any event. The United States Court of Appeals for the Ninth Circuit stated the following:

> "The violation of a constitutional right by a subterfuge cannot be justified and the circumstances of this case leave no other inference than that is what was done with the traffic arrest warrant here."
>
> *Taglavore v. United States* (1961), 291 F. 2d 262.

Obviously, the same thing again applies. The circumstances in the instant case would leave no other inference than that what was done was for the purpose of the search.

The court in the Taglavore case pointed out on Page 266:

> "Were the use of misdemeanor arrest warrant as a pretext for searching people suspected of felonies to be permitted a mockery could be made of the Fourth Amendment and its guarantees. The courts must be vigilant to detect and prevent such a misuse of legal processes."

The point then becomes crystal clear. If it is wrong to use a misdemeanor arrest warrant as a pretext for searching people, it is equally wrong to use a misdemeanor arrest as a pretext for searching people. Particularly when the officers sit there waiting for a supposed misdemeanor to happen.

The United States Supreme Court decision starting with *Escobedo v. Illinois* (1964) 378 U. S. 478 has extended certain constitutional rights to the defendant from the time of the initial arrest. This court has held that it is the

duty of the police officers to warn the accused that what he might say can be used against him at a trial and to inform him of his right to an attorney and his right to remain silent.

In this case the officers did inform the Petitioner of his right to remain silent and his right to have an attorney represent him, but after he had made certain damaging admissions. It is Petitioner's understanding of recent rulings that the officers have a duty to immediately advise the accused of his right to remain silent and his right to have an attorney before the damaging admissions are made.

It is correct as the Seventh Circuit Court states in this case that there is no duty of the officers to gag an accused but the advice and statement that the accused can remain silent is a little late when it comes after the admissions have been made. This is what happened here. After the Petitioner had made damaging statements to police officer Dora Ward, the witness Dora Ward told Petitioner, "You don't have to talk to me at all." Later at headquarters Sgt. Jones told the petitioner he could have a lawyer summoned for him. Thus, it is apparent that the Petitioner was advised of his constitutional rights, but not immediately and not before any admissions were made.

CONCLUSION

There is a need for clarification on the proposition that the informer should be produced at a trial to afford the

Petitioner the right of cross examination and confrontation. The Seventh Circuit Court of Appeals states there is no duty on the part of police officers to gag or seal the lips of a person under arrest or in custody in order to prevent them from making a statement. There is need, therefore, for clarification at what point must the officers advise the accused of their constitutional rights to remain silent and to have an attorney.

In line with this Court's past decisions, there has been a necessity to show the reliability of the informer. There is no question that this was not done in this case. Therefore, the Seventh Circuit Court of Appeals has not followed this Court's decisions in this case on the issue of reliability of the informer.

The practice of not producing the informer in Court by the Government should be stopped.

The fact that the informer later testified and gave an affidavit that he did not give the police officer the information attributed to him pinpoints the informer's lack of reliability and casts a strong doubt as to whether there was probable cause in which to seize and search the Petitioner.

It is respectfully submitted that this is a case where injustice has been done and a grevious mistake has been made.

The issuance of a Writ of Certiorari by this Court is necessary for the ultimate administration of justice.

Respectfully submitted,

ROBERT H. VAN BRUNT,
233 Lemcke Building,
106 E. Market Street,
Indianapolis, Indiana 46204

PAUL H. FRAZIER,
315 Lemcke Building,
106 E. Market Street,
Indianapolis, Indiana 46204
Attorneys for Petitioner.

FERDINAND SAMPER,
703 First Federal Building,
11 N. Pennsylvania St.,
Indianapolis, Indiana 46204
Of Counsel.

APPENDIX

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

CHICAGO, ILLINOIS 60610

TUESDAY, NOVEMBER 15, 1966

Before

HONORABLE J. EARL MAJOR, SENIOR CIRCUIT JUDGE

HONORABLE LATHAM CASTLE, CIRCUIT JUDGE

HONORABLE WALTER J. CUMMINGS, JR., CIRCUIT JUDGE

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. No. 15460 BOOKER T. DUKE, *Defendant-Appellant.*	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

CHICAGO, ILLINOIS 60610

SEPTEMBER TERM AND SESSION, 1966

UNITED STATES OF AMERICA,
v.
Plaintiff-Appellee,

No. 15460

BOOKER T. DUKE,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

NOVEMBER 15, 1966

Before MAJOR, *Senior Circuit Judge, and* CASTLE and CUMMINGS, *Circuit Judges.*

MAJOR, *Senior Circuit Judge.* Defendant, Booker T. Duke, and Richard Lee Allen were charged by indictment with receiving, concealing and facilitating the transportation of 163 grams of heroin, a narcotic drug, which had previously been imported into the United States contrary to law, knowing the same to have been unlawfully imported, in violation of Title 21 United States Code Sec. 174. From a judgment entered upon an adverse jury verdict Duke appeals.

Prior to trial defendant moved to suppress evidence alleged to have been obtained by the unauthorized search of his person and automobile in connection with his alleged illegal arrest. The court, after a hearing, denied the motion; and the evidence was admitted at the trial.

Defendant as grounds for reversal advances three contentions: (1) that there was not sufficient probable cause to justify the apprehension and search of defendant and his automobile and that his motion to suppress the evidence obtained thereby was improperly denied; (2) that certain statements made by defendant while in the custody of officers were erroneously admitted in evidence because obtained from him before he had been sufficiently advised of his constitutional rights, and (3) that the evidence was insufficient to prove that defendant had knowledge that the involved narcotics had been illegally imported into the United States.

A brief statement of the evidence developed at the hearing on the motion to suppress appears to be appropriate. At about 10 a.m. on October 15, 1964, narcotic detectives Richard Jones and Dora Ward were approached by Emanuel Sims who advised them that defendant had left for Chicago at 3 o'clock that morning in the company of Allen, in a 1960 Ford bearing 1964 Indiana license 93A7884, for the purpose of purchasing a large amount of heroin, and were due back in Indianapolis at any time. Sims also told the officers that he was present when defendant and Allen left for Chicago and heard them discuss the purpose and plan of their trip. Jones was acquainted with defendant and Allen and had known Sims for three or four years. Previously he had made several arrests on the basis of information furnished by Sims.

After receiving the aforesaid information, Jones and Ward called to their aid a number of state officers, including Sgt. Larsen of the Indiana State Police, and motorcycle officer Roland Gibson. A surveillance was set up on highway 52, the normal route between Indianapolis and Chicago. All of the officers were given a description of the car and its license number, as furnished by Sims. At about 3 p.m., Jones received radio information that Larsen was following an automobile of that description. A few minutes later the automobile passed the station where Jones was located and he saw defendant and Allen in the car. Jones followed the car, which was also being followed by Gibson, who clocked its speed at 44 miles per hour in a 30-mile zone. Gibson stopped the car, which was being driven by Allen with defendant seated on the passenger side of the front seat. Defendant reached under the front seat, whereupon Gibson drew his revolver and told both occupants not to move. At almost the same time Jones and other officers arrived, and the occupants were required to get out of the car. Jones reached under the front passenger seat and discovered a sack containing approximately 30 small packages, each of which held white powder. Jones then conducted an on-the-scene field test on the contents of some of the packages and obtained an affirmative indication that they contained narcotic drugs. This indication was later properly verified, and it was the property thus obtained which constituted the subject matter of defendant's motion to suppress.

The gist of defendant's argument relative to his motion to suppress is that the arrest and search were unlawful because of the failure of the officers, at a time when the courts were open, to obtain a warrant for his arrest or a warrant to search, in view of the fact that they had some five hours to do so. This time element is calculated on

the basis that the officers received information from Sims at about 10 a.m. and defendant's arrest and the search did not take place until 3 p.m. In this connection, it is pertinent to note that according to the information furnished by Sims, defendant and Allen left Indianapolis for Chicago at 3 a. m. In the absence of record proof, we take judicial notice of the fact that the distance from Indianapolis to Chicago and return is less than 400 miles, or about an 8-hour drive.

Certainly the officers had a solid basis for belief that defendant and his companion might be returning to Indianapolis at any time, and ample justification for placing the highway under surveillance. Any doubt which they might have had at that time as to the existence of probable cause to arrest and search was completely dispelled when they observed an approaching car of the same description, with the same license number and the same occupants (including defendant) as Sims had predicted.

Pertinent to the situation is a statement in *United States v. Rabinowitz,* 339 U.S. 56, 65, "Whether there was time may well be dependent upon considerations other than the ticking off of minutes or hours. The judgment of the officers as to when to close the trap on a criminal committing a crime in their presence or who they have reasonable cause to believe is committing a felony is not determined solely upon whether there was time to procure a search warrant. Some flexibility will be accorded law officers engaged in daily battle with criminals for whose restraint criminal laws are essential."

In any event, irrespective of the time element, the cases strongly support the right, where probable cause exists,

of an officer to arrest and search without a warrant. A case with similar facts is *Draper v. United States,* 358 U.S. 307. There, the federal narcotic agents received information from an informer that the defendant had left Denver by train for Chicago, was going to bring back a quantity of heroin and would return either on the morning of September 8 or 9. The informer gave the agents a description of the defendant. The agents watched the train arrivals on the first day without avail. On the second day a person of the description given to the agents by the informer alighted in Denver from the Chicago train. The officers without a warrant arrested him and searched his person. The court affirmed a conviction over the protest that the arrest and search were illegal. The only difference between that and the present case is that here the officers not only arrested the defendant and searched his person but also the car in which he was riding. We think it evident that the officers had probable cause to believe that the automobile was being used by defendant in the transportation of the contraband material and the right to search it.

The right to arrest, search and seize without a warrant as recognized in *Draper* has been given effect in many cases, particularly where a moving object such as an automobile was involved. See *United States v. Bracer,* 342 F.2d 522, 523; *United States v. Santiago,* 327 F.2d 573, 574; *United States v. Thomas,* 319 F.2d 486. In the latter case the court sustained a search of an automobile without a warrant with the statement (page 488) that it was not necessary to obtain a search warrant "if it appeared likely at the time that the delay incident to obtaining a warrant would result in losing the opportunity to apprehend the law violator" (citing cases).

We hold that the motion to suppress was properly denied and, consequently, that the evidence obtained by the search of the subject automobile was admissible.

Defendant contends that certain statements made by him while in the custody of officers were erroneously admitted in evidence because of a failure to advise him sufficiently of his constitutional rights. Defendant's sole reliance on this point is *Escobedo v. Illinois*, 378 U.S. 478. The facts of that case vary so widely from those here that we think its rationale is without application.

There is no serious dispute in the evidence as to what took place after defendant's arrest. He was placed in the squad car of officers Jones and Ward and taken to the police station. During the trip defendant voluntarily stated, "You have got me up tight. What can I do to help myself?" Ward replied, "You don't have to talk to me at all." At the station Jones asked defendant if he would like to have an attorney summoned and defendant replied, "No, I will get one in court tomorrow." He was told at that time by officer Owen that he was entitled to have his attorney present, and defendant replied that he would rather try to help himself and cooperate and that he did not wish an attorney. Again defendant stated that he would like to help himself because the investigators apparently had him "up tight." He voluntarily stated that he obtained the narcotics from a man nicknamed "Copperhead" who operated in Chicago, and that defendant had paid $1500 for the narcotics which had been confiscated from the subject automobile. The next morning a federal warrant was issued and defendant was taken before a United States Commissioner. He was again told by the federal agent that he did not have to say anything, and he was requested to talk to his lawyer. He was also

told that anything he said might be used against him, to which he responded, "I don't care what my lawyer says; I want to cooperate and help myself."

We think it plain that he was fully advised of his right to an attorney and that he persisted in a refusal to have one in the belief that he could better help himself.

Defendant makes the point that he was not advised of his rights prior to making the statement in the squad car while on the way to the station. Even so, this statement was not incited, induced or called for by anything said or done by the officers. The unsolicited statement was a voluntary utterance by defendant. We think the constitutional rights of a person under arrest or in custody do not require an officer to gag him or seal his lips in order to prevent him from making a statement.

Lastly, defendant contends that there was no proof that he had knowledge that the narcotic drugs found in his possession were unlawfully imported into the United States. This question was not raised in the trial court and is not properly here for review. In any event, the contention is wholly without merit. See *United States v. Kapsalis*, 313 F.2d 875, 877; *United States v. Norton*, 310 F.2d 718, 719; *United States v. Johnson*, 260 F.2d 508, 509.

The judgment appealed from is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

CHICAGO, ILLINOIS 60604

WEDNESDAY, DECEMBER 7, 1966

Before

HONORABLE J. EARL MAJOR, SENIOR CIRCUIT JUDGE

HONORABLE LATHAM CASTLE, CIRCUIT JUDGE

HONORABLE WALTER J. CUMMINGS, JR., CIRCUIT JUDGE

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

No. 15460

BOOKER T. DUKE,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

After due consideration by the Court, defendant's petition for rehearing in the above entitled case, filed November 28, 1966, is denied on its merits. In connection therewith, plaintiff's motion to strike or summarily deny defendant's petition for rehearing is denied.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 948

BOOKER T. DUKE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgment of the court of appeals was entered on November 15, 1966 (Pet. App. 1a-2a). A petition for rehearing was denied on December 7, 1966 (Pet. App. 10a). The petition for a writ of certiorari, filed on January 9, 1967, is out of time under Rule 22(2) of the Rules of this Court. There is, in any event, no occasion for further review.

Petitioner was convicted of possessing unlawfully imported narcotics, in violation of 21 U.S.C. 174, and sentenced to five years' imprisonment. The evidence showed that at approximately 10:10 a.m. on October

15, 1964, an informer, Emanuel Sims, told Richard Jones of the Indianapolis Police that petitioner and one Richard Allen had gone to Chicago to obtain a quantity of narcotics (G. 6).[1] Sims, who had been a reliable informer associated with Jones for the past nine years (G. 9, 14, 32), explained that he had been with petitioner and Allen at approximately 3:00 a.m. that morning, and that they told him of their plans (G. 9, 13).[2] Sims also told Jones that petitioner and Allen would be returning to Indianapolis in a short while and gave a detailed description of the automobile which they would be driving (G. 9). Jones had previously kept petitioner's pool room under observation because known addicts frequented the place (G. 8-9).

At approximately 3:00 p.m., as predicted, petitioner was observed in the car described by Sims driving towards Indianapolis (G. 11). The police halted petitioner's car and ordered both its occupants to step out. A search of the car revealed a package of heroin under the seat which petitioner had occupied (G. 11, 15, 20).

During the ride to police headquarters, petitioner stated to an accompanying officer, "You have got me tight. What can I do to help myself." The officer

---

[1] "G." refers to the government's appendix; "Tr." refers to the original transcript of trial, and "H" refers to hearing on motion for new trial, which we are lodging with the Clerk of this Court.

[2] Richard Allen, who was previously convicted, testified that he told Sims that they were going to Chicago to obtain heroin (Tr. 170).

replied, "You don't have to talk to me at all" (Tr. 85; G. 4, 12). Upon arrival at headquarters, petitioner was advised of his right to remain silent and to have the assistance of counsel. Petitioner replied that he did not want counsel at that time, but that he would get one the following morning (G. 4, 7, 12, 15, 16, 17). He then repeated that he wished to "help himself" and again was informed that he need not say anything (G. 4-5). Petitioner then told the local police authorities that, when apprehended, he was returning from his fifth trip to Chicago to purchase heroin and that he had purchased $1500 worth of heroin from one William Anderson that morning in Chicago (G. 5).

The following morning, petitioner was released into the custody of federal agent Rankin for possible federal prosecution (G. 18). After he was advised of his right to counsel and to remain silent, petitioner again stated that he did not want a lawyer and related the circumstances of his trip to Chicago (G. 18-19).

1. Upon conclusion of the government's case, petitioner moved to strike all testimony and evidence relating to the narcotics found in his car, and the statements subsequently made by him, on the ground that the arrest was not founded upon probable cause. The motion was properly denied. The informant Sims had long been known to officer Jones, and the officer had found him reliable. The officer made a careful inquiry into the manner in which Sims had acquired the information pertaining to petitioner's trip to Chi-

cago. Moreover, the detailed description of the car and its occupants given by Sims was fully corroborated by observation. As in *Draper* v. *United States*, 358 U.S. 307, 313, the arresting officers "had personally verified every facet of the information given * * * by [the informer] except whether petitioner had accomplished his mission * * *." In these circumstances, the officers clearly had probable cause to arrest petitioner. *Draper* v. *United States*, *supra*; *Costello* v. *United States*, 324 F.2d 260 (C.A. 9), certiorari denied, 376 U.S. 930.

That Sims later, on a motion for a new trial, denied that he had supplied information to Jones is of no moment. In light of the circumstances shown at that hearing,[3] the trial court could properly discredit his testimony and adhere to the finding that there was probable cause supporting the arrest. *United States* v. *Campos*, 255 F. Supp. 853 (S.D.N.Y.), affirmed, 362 F. 2d 1011 (C.A. 2), certiorari denied, 385 U.S. 842.

2. The trial court properly admitted testimony relating the incriminating statements made by petitioner after his arrest. Petitioner's trial was commenced prior to June 13, 1966, and was thus not governed by the principles laid down in *Miranda* v. *Ari-*

---

[3] In support of a motion for a new trial, petitioner submitted an affidavit signed by the informer, Sims, attesting that he had never given any information to officer Jones. At a hearing on this motion, Sims testified to the same effect (H. 23-24). However, other evidence showed that Sims received twenty dollars from petitioner upon signing the affidavit (H. 25) and that Sims had been threatened by petitioner and was afraid of him (G. 27, 30, 31).

zona, 384 U.S. 436. See *Johnson* v. *New Jersey*, 384 U.S. 719.

The one statement which petitioner made prior to being advised of his right to counsel and to remain silent—*i.e.*, "You have got me tight. What can I do to help myself?" (Tr. 85; G. 4, 12)—was a spontaneous, unsolicited remark. The remainder of petitioner's statements were made after he was fully advised of his constitutional rights. Petitioner did not request the assistance of counsel, but in fact declined offers of such assistance. Accordingly, petitioner's voluntary statements were not taken in violation of the principles established by *Escobedo* v. *Illinois*, 378 U.S. 478.

3. Petitioner's contention that he was denied the right of confrontation under the Sixth Amendment because the informer was not produced at trial comes too late, having been raised for the first time in his petition for rehearing in the court of appeals. See *Rugendorf* v. *United States*, 376 U.S. 528, 534. It is, in any event, without merit. The government had no duty to produce the informer, whose identity was revealed to the defense and whose whereabouts were unknown.[4] See *United States* v. *Cimino*, 321 F. 2d 509, 512 (C.A. 2); *Williams* v. *United States*, 273 F. 2d 781, 795-796 (C.A. 9), certiorari denied, 362 U.S. 951. And petitioner was not prejudiced by the informer's absence. Indeed, the defense sought to

---

[4] At the time of trial, a warrant had been issued for Sims' arrest on an unrelated matter, and there was evidence that the police did not then know where he could be found (Tr. 55-56, 69-70).

capitalize on Sims' absence at trial as part of its argument that he was "unreliable" (Tr. 69-70, 156-157). Moreover, Sims ultimately did appear (at the hearing on petitioner's new-trial motion) and testified before the court on the only issue as to which his testimony was sought by the defense—that of probable cause. Thus, assuming *arguendo* that petitioner had a right to have the testimony of the informer with regard to the legality of his arrest—an issue to be decided by the court alone (9 Wigmore, *Evidence* § 2550)—that testimony was properly presented here.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
LAWRENCE P. COHEN,
Attorneys.

FEBRUARY 1967.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 245131 585

LIBRARY
SUPREME COURT, U. S.

FILED
MAR 16 1967
JOHN F. DAVIS, CLERK

IN THE

United States Supreme Court

No. 948

BOOKER T. DUKE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ROBERT H. VAN BRUNT,
233 Lemcke Building,
106 E. Market Street,
Indianapolis, Indiana 46204
Attorney for Petitioner.

Central Publishing Company, Inc., Indianapolis, Ind.

INDEX

Page

Grounds for Rehearing 2

Judge Steckler's Entry in separate case on the same defendant in the same district regarding jury selection 3

End of Entry 21

Conclusion 25

Certificate of Counsel 26

CITATIONS

Cases

Page

Brown v. Allen, 344 U. S. 443, 474, 73 S. Ct. 397, 416 .. 16

Rabinowitz v. United States, 366 F. 2d 34 (5th Cir. 1966) 14, 15, 16, 17, 18, 22, 25

United States v. Henderson, 298 F. 2d 522 (7th Cir. 1962) 16

Statutes

Title 28, U. S. Code, Section 1861 ..... 14, 15, 25

IN THE

United States Supreme Court

No. 948

BOOKER T. DUKE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable, Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner Booker T. Duke, respectfully requests that this Court reconsider its ruling denying his petition for certiorari. The petition for certiorari was denied on February 20, 1967.

Under Rule 58(1) of the Rules of this Court, this petition is due to be filed not later thanu March 17, 1967. The petitioner is now in the custody of the Marshal of the United States.

A.

SUBSTANTIAL GROUNDS AVAILABLE TO PETITIONER, ALTHOUGH NOT PREVIOUSLY PRESENTED. ALSO ONE INTERVENING CIRCUMSTANCE OF SUBSTANTIAL EFFECT.

The petitioner in the instant case filed his petition for certiorari with the United States Supreme Court on January 9, 1967. On February 9, 1967 Judge William E. Steckler of the United States District Court for the Southern District of Indiana, Indianapolis Division held in Cause No. IP 66-CR-133 that the jury selection system was within the constitutional and statutory requirements. However, this decision came after defendant had already filed his petition for certiorari.

We believe the decision is wrong and that the Judge's entry shows clearly that the system in which federal juries are and were selected in this district violated the statute. The following entry shows on its face, the statute, Title 28 U. S. code, section 1861, was violated.

The defendant-petitioner is presently awaiting trial in another matter in the case of United States of America, plaintiff, vs. Booker T. Duke a/k/a Smitty and Jimmie Lee Stanback, defendants, in Cause No. IP 66-CR-133. Petitioner respectfully requests this court take judicial notice of the District Court Judge's entry of February 9, 1967 which relates to the same district and the same defendant but in another matter.

"UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA, *Plaintiff,* v. BOOKER T. DUKE a/k/a SMITTY, JIMMIE LEE STANBACK, *Defendants.*	NO. IP 66-CR-133

ENTRY

Each of the defendants in this cause has alleged that the indictment herein was returned by a Grand Jury which was constituted illegally in that the following groups were excluded from consideration for jury service either in whole or in part: (1) Negroes, (2) Young Adults, (3) Persons With Low Incomes, (4) Women, (5) Political Groups, (6) Geographic Groups, (7) Religious Groups, and (8) Persons who do not happen to be acquainted with a juror suggestor.

The defendants' allegations concerning Group 7 arise from the fact that in this District jurors have bee obtained in large part by the juror-suggestor or so-called "key-man" system. Under this sytem, the Clerk and the Jury Commissioner communicate with suggestors throughout the District by mail and request that they recommend persons as prospective jurors. With few exceptions these juror suggestors are county clerks, county assessors, postmasters or school superintendents.

The Clerk and Jury Commissioner's letter which is sent in normal course reads as follows:

Dear

The right of a trial by jury is one of our most cherished democratic traditions; however, this right can be a meaningful one only if jurors are capable and impartial and are selected without regard to race, color, creed politics or station of life. We, as jury commissioners for the Federal Court at Indianapolis, are charged with the duty of getting jurors of this kind.

Because such jurors should be drawn from all parts of the large area served by the Indianapolis seat of court and should represent all walks of life and points of view, we need the help of conscientious and well informed citizens in properly discharging this obligation. That is why we are calling upon you to suggest the names of men and women in your community who, in your judgment, would make qualified jurors. It is because we feel that you are in a position to know citizens who measure up to the standards of good jurors that we are writing you.

For your convenience we are enclosing a sheet on which to list your candidates. In making your suggestions please refer to the statutory requirements set forth on the attached sheet. Naturally, your suggestions will be kept in strictest confidence. Although we do not want you to act hastily in the important task of preparing your list, we ask that you return it promptly.

Believe us, your help is urgently needed. Your made an important contribution to the better only reward will be the knowledge that you have functioning of a vital democratic institution. We are sure that for you this will be reward enough.

As the form letter itself states, a copy of Title 28, United States Code, Sections 1861 and 1862 was enclosed with each letter and the suggestors were thus advised as to the statutory qualifications and exemptions for federal jurors.

Also enclosed with the aforesaid form letter were two page forms consisting mostly of blank lines with the following two paragraphs appearing at the top of the first page:

> I consider the following named persons qualified and not exempt as jurors. (See Qualifications and Exemptions on Sheet Attached.)
>
> Please print First Name, Middle Initial, Last Name, Complete Address, and Occupation, like example following:

	415 E. 5th St.	
John W. Jones	Bloomington	Teacher

This text was followed by thirty blank lines and a space for the signature and address of the suggestor.

A very substantial majority of the jurors who have served in this District in recent years were selected from lists provided by juror selectors who returned the above-described form to the Clerk's office through the mails. A few juror suggestors communicated with the Clerk or the Jury Commissioner verbally and submitted written lists. In these instances, the Clerk or the Jury Commissioner personally informed the suggestors of the statutory qualifications and exemptions and gave them instructions not at variance with the advice given in the above-quoted form letter. In addition to the sug/gested jurors, the names of a small percentage of the jurors who have served in this

District were taken at random from city directories and telephone directories by the Clerk or his deputies. When names were obtained in this manner, it usually was under emergency conditions resulting from an insufficient number of names being obtained through the normal system. The Clerk testified that when names were obtained in this manner, no heed was paid to the income or social status of the person thus picked as it was reflected by his address or to the nationality of such persons as reflected by their names.

With respect to the seventh of the above-listed allegedly excluded groups, there can be no question that all persons who did not happen to be acquainted with those persons who happened to be selected as juror suggestors were, for all practical purposes, effectively precluded from jury service. This, of course, would be the case with any "key-man" or juror suggestor system and this alleged exclusion or preclusion presents the legal question of whether the "key-man" or juror suggestor system is illegal per se. This question will be disposed of in the conclusions of law which appear hereafter.

With respect to the other six of the seven allegedly excluded groups, more complex questions of fact are presented. Under recent case decisions in the Fifth Circuit which will be discussed hereafter, it appears that a jury selection system must be subjected to scrutiny on more than one level and that proof that the jurors actually selected constitute a substantial cross-section of the community will not suffice to establish the legality of the system. It also must appear that the system is calculated in its design to produce a juror list which constitutes a cross section

of the community and that where jurors are recommended instead of drawn at random, it must appear that the suggestors as a whole are acquainted with a cross section of the community. Thus the Court must consider the evidence as it reflects upon each allegedly excluded group with respect to each of the three above-recited criteria.

On the question of whether the juror selection system in this District is calculated in its design to obtain a jury list constituting a cross section of the community, the only evidence pro or con appears in the above-quoted Clerk and Jury Commissioner's letter which was used to procure a substantial majority of the jurors who have sat in this District. Although this letter explicitly states that jurors are to be selected "without regard to race, color, creed, politics or station of life" and that they should "represent all walks of life and points of view" the Defendants have urged that the words and phrases "capable and impartial" jurors, "good jurors," and "in your judgment would make qualified jurors" are calculated to result in the selection of an elite group to serve on our juries.

In the evidence in this cause, the Court has before it the narrative summary of sevent-nine interviews of juror suggestors. Not one of these interviews even suggests that any of the jury selectors were in any way led to disregard the federal jury statutes which were enclosed with the letter by anything to be found in the text of the letter. But even with the assistance provided by the aforesaid interviews, the Court cannot read the minds of the juror selectors and the best evidence as to whether they were improperly influenced by the letter they received is to be found

in a study of a cross-section of the jurors which the suggestors recommended. The Court finds nothing overtly unlawful in the letter which the Clerk and Jury Commissioner sent to the selectors and it will conclude that the jury selection system in this District has been lawful in its design unless it appears that there has been some exclusion in fact.

With respect to the question of whether the juror selectors as a whole were sufficiently acquainted with members of the groups who allegedly were excluded, and with respect to the question of whether the jurors actually selected constituted a cross section of the community, no blanket finding can be made and separate findings must be made with respect to each allegedly excluded group.

A questionnaire which the government mailed to the one hundred forty juror selectors whose names appeared in the Clerk's files for the past three years and which was responded to by ninety seven of the selectors indicated that 76% of the selectors had a speaking and/or nodding acquaintance with at least one Negro. Only four of the remaining 24% or approximately 5% of the suggestors came from counties where the 1960 census figures indicated that more than one half of one percent of the county population was Negro. On this basis, the Court finds that 95% of the suggestors were acquainted with Negroes or they were from areas where the percentage of Negro population was so small that they couldn't necessarily be expected to be acquainted with any Negroes.

The Defendants' own evidence established that the adult population of the Southern District of Indiana

is 4.87 negro insofar as the 1960 census figures reflect. The plaintiff presented evidence from the same census figures to the effect that Negroes constitute only 4.17% of the adult population of the Southern District of Indiana which has a seventh grade or higher educational background. The plaintiff also presented the testimony of the three room clerks for the judges of this Court who were sitting during the past three years. These room clerks attested to the number of petit jury venires they had witnessed during the two years preceeding the filing of the defendants' motion, the average number of jurors who appeared in court on each venire and the total number of individual Negroes whom each of them positively could recall seeing on petit jury venires.

On the basis of the aforesaid testimony, the Court now finds that at least 5.03% of the jurors who are summoned and actually appear for service in this District are Negroes, that Negroes constitute 4.87% of the adult population in this District and that Negroes constitute only 4.17% of the functionally literate adult population in this district. The uncontradicted evidence further showed and this Court judicially knows that the grand jurors are drawn from the same source as the petit juror panels in all four divisions of the district and on this basis, the Court further finds that the foregoing statistics apply to the list from which the grand jury under attack was drawn.

The Defendants' allegation that young adults have been excluded from jury service has not been supported by any evidence. The plaintiff has presented evidence that the average age of the grand jurors who returned the indictment and the members of the

two preceeding grand juries was 48.44 years and there also has been evidence that there is an average lapse of one year between the recommendation of a juror's name and the drawing of his name from the wheel. The uncontradicted evidence also has shown that the average age of adults in this state is 46.5 years and on the basis of the foregoing figures, the Court finds that the average age of recommended jurors in this district is less than one year greater than the average age of adults in this district.

The defendants presented no evidence in support of their allegation that persons of low income were being excluded from jury service other than the testimony of attorneys who were experienced with state and federal juries and who gave highly speculative testimony to the effect that federal jurors in this district were of a "better quality" than state jurors. The plaintiff responded with evidence arising from the questionnaire which was answered by ninety seven selectors and from the census figures viewed in conjunction with the records of the Clerk.

In the plaintiff's questionnaire, the juror suggestors were asked to state whether they had a speaking and/or nodding acquaintance with and knew the name of at least one person who belonged to each of the groups appearing on the following table. The percentage figures which appear on this table constitute the percentage of suggestors who did have such an acquaintance with at least one member of the listed groups.

Republicans	95.5%	Persons with twice your income	82.0%
Office Workers	95.5%	Skilled Laborers	81.0%
Protestants	95.0%	Negroes	76.0%
Teachers	95.0%	Office Managers	76.0%
Owners of Small Business	95.0%	Waiters	74.0%
Democrats	93.0%	Engineers	74.0%
Catholics	93.0%	Deliverymen	72.0%
Persons with half your income	87.5%	Farm Laborers	72.0%
Carpenters	91.0%	Foremen	69.0%
Farmers	87.5%	Machinists	67.5%
Salesmen	87.5%	Jews	66.0%
Gas Station Attendants	87.0%	Bartenders	58.0%
Barbers	86.0%	Hotel Managers & Clerks	54.0%
Janitors	86.0%	Bus or cab drivers	43.0%
Factory Workers	84.0%	Garbage collectors	42.5%
Store Clerks	84.0%	Guards	40.0%
Nurses	83.0%	Hotel Workers	39.5%
Construction Workers	83.0%	Persons of no religion	24.3%
Mechanics	82.0%	Porters	15.5%

It appears that 95.5% of the suggestors indicated their acquaintance with office workers while only 76.0% of them indicated their acquaintance with office managers, that 84.5% indicated their acquaintance with factory workers and 81.5% indicated their acquaintance with skilled workers but only 69.0% indicated their acquaintance with foremen and that 86.0% indicated their acquaintance with janitors but only 65.0% indicated their acquaintance with engineers. On the basis of the foregoing, the Court finds that the juror suggestors were sufficiently acquainted with a socio-economic cross-section of the community to render them capable of suggesting jurors who constitute such a cross-section. From this alone, of

course, it does not follow that jurors who have been recommended constituted such a cross-section in fact. This Court knows from its experience with venires and it does not appear to be disputed that the social and economic attributes of jurors who have appeared in this Court are many and varied. But this does not militate against the defendants' essential argument that while the jurors come from all socio-economic stati, they represent, on the whole, the higher echelons of the community as opposed to the lower.

Drawing from the census figures and from the records of the Clerk, the plaintiff has presented evidence showing that the approximate statistical average income of workers of all ages in the state of Indiana is $4,100 while the approximate statistical average income of jurors in this district is $5,100 (with 1960 census figures being used in both cases.) This would indicate a twenty percent deviation between the average income of jurors and the average income of wage earners. But then, when a mathematical adjustment is made to exclude wage earners who are not adults, the plaintiff's evidence has shown that the statistical average wage of adults in this state is within ten percent of the statistical average wage of jurors. The plaintiff has further argued that if it were possible to consider other factors, it would appear that there is no deviation between the average income of jurors and wage earners. These factors include the plaintiff's suggestion that if the incomes of illiterates, felons and other persons who are excluded from jury service by statute were to be abstracted from the adult wage earners average income figure, the aforesaid deviation would dwindle to zero.

On the basis of the foregoing, the Court finds that

the jurors selected in this district do constitute a substantial socio-economic cross-section of the community.

In support of their allegation that women are excluded from jury service in this district, the defendants have presented the testimony of various attorneys and other persons who have observed proceedings in the federal courts of this District for a number of years. All of these witnesses testified that male jurors substantially outnumber female jurors but all of them further testified that they could not remember a single venire which did not contain members of both sexes and they could recall very few occasions when an all male petit jury was seated after the exercise of peremptory challenges by counsel. The seventy-nine interviews of juror-suggestors which were submitted in evidence show that only two of them regarded women as inferior jurors and that while only five of the seventy-nine suggestors were women, two of the women suggestors failed to name any women. On the basis of the foregoing, the Court finds that there is nothing in the design of the jury system in this district which is calculated to exclude women. The Court further finds that the jury list does not contain a statistical cross-section from the standpoint of sex, but that both sexes are represented substantially. By "substantially represented" the Court means that it is very unlikely that a verdict would be rendered in this district without members of both sexes having an opportunity to influence the result. It must be kept in mind, of course, that the exercise of peremptory challenges during a voir dire can result in the exclusion of any given group in a given trial but it also must be kept in mind that the

presence of members of an unwanted group in the venire will result in the exhaustion of a party's peremptory challenges and this in turn will have an ultimate influence on the verdict. This is not to say that the token presence of women on every venire would constitute sufficient representation. The Court finds that there has been substantially more than mere token representation of women on the juries in this district.

As to the defendants' allegations pertaining to the claimed exculsion of Political Grops, Geographic Groups and Religious Groups, there has been no evidence of such probative value as to merit discussion or findings.

In view of the foregoing evidence, the Court concludes as a matter of law that the jury list from which the grand jurors who returned the indictment in this cause were drawn and selected contained the names of prospective jurors who represented a sufficient cross-section of the community to satisfy the legal requirements of Title 28, United States Code, Section 1861 under every judicial interpretation of that statute which has been brought to this Court's attention. This Court specifically has considered the recent decision in *Rabinowitz v. United States,* 366 F. 2d 34 (5th Cir. 1966) which has been the mainstay of the defendants' legal theory.

In the *Rabinowitz* case, the Fifth Circuit declared an indictment illegally returned where it appeared that the jury list contained only 5.8% Negroes while the percentage of Negroes in the adult population of the division from which the jurors were drawn was 34.55%. In addition to this holding, four of the

eight judges who participated in the *Rabinowitz* decision concurred in a lengthy and elaborate opinion which the defendants have interpreted to have the following meaning:

1. The Jury Commissioner and Clerk who are the only persons entrusted with the statutory duty of obtaining jurors must not establish or invite the establishment of one or more standards or qualifications other than those standards or qualifications specifically enumerated in Title 28, U. S. Code, Section 1861.

2. If the Jury Commissioners delegate their authority to key-men in whole or in part, these key-men must not employ standards which are in addition to those prescribed by Title 28, U. S. Code, Section 1861, because this constitutes an exclusion per se of those persons who make up the statutorily qualified pool and who have an absolute right to serve on juries.

3. The prospective jurors selected by the jury commissioners and/or key-men must represent a fair cross-section of the population of the particular district in which the court sits even if the jury commissioners and the key-men do not establish standards of qualifications in excess of Title 28, U. S. Code, Section 1861.

The defendants have urged that the jury system in this district violates the first of the above-quoted criteria which they find in the *Rabinowitz* decision because the letter which the Jury Commissioners sent to the juror suggestors asked them to use their own judgment and suggest "good" jurors. The defendants have further urged that the system in this district violates the second of the above-quoted cri-

teria which they find in the *Rabinowitz* decision because the suggestors considered such things as "intelligence" and "common horse sense" and these "qualifications" are not mentioned in Title 28, United States Code, Section 1861 and because the sugggestors suggested only persons they knew and "knowing a suggestor" is not mentioned in the statutory qualifications.

This Court will not presume to render an authortative interpretation of the four-judge opinion of the Court in the *Rabinowitz* case as that opinion can speak for itself and it speaks for itself very explicitly in footnote 32 (366 F. 2d 51) where it states that it is not to be construed as opposite to the opinion of the Court of Appeals of this Circuit in *United States v. Henderson,* 298 F. 2d 522 (7th Cir. 1962) which reads in pertinent part as follows at page 525:

> "Recognition that the statute envisions "efficient" service requires rejection of a conclusion that an intelligence level equated with mere literacy was intended to be imposed as a maximum standard to be employed by the clerk and the commissioner in the selection of persons pursuant to Section 1864 whose names are to be placed in the box from which jurors are drawn.
>
> "And this view of the statute not only is in accord with its express provisions but is in harmony with the observation in Brown v. Allen, 344 U. S. 443, 474, 73 S. Ct. 397, 416, 97 L. Ed. 469 that no due process infirmity invalidates a jury source which "reasonably reflects a cross section of the population suitable in character and *intelligence* for that civic duty." (Emphasis supplied by the Seventh Circuit.)

In view of the *Henderson* decision and footnote 32 of the four-judge opinion in the *Rabinowitz* case, this Court can only conclude that the fact that the juror suggestors in this district have considered "intelligence" and "common horse-sense" and other personal qualities not related to race, politics, socio-economic status, age or sex does not militate against the legality of the jury system in this district when judged in the light of the said four-judge opinion. For the same reason, the Court concludes that there is nothing illegal in the design of the jury system in this district arising from the fact that the Commissioners' letter asked the suggestors to use their own judgment and suggest good jurors.

It also should be noted that the four-judge *Rabinowitz* opinion upon which the defendants rely was not joined in total by a majority of the court and the special-concurring opinion of Judge Brown must be considered in determining the import of the *Rabinowitz* decision. Judge Brown's opinion reads in pertinent part as follows:

> "In order to avoid a 4-to-4 deadlock and the unfortunate predicament of a Court being unable authoritatively to decide a case, (citing cases) I cast my vote, weak as it is, for the thesis developed at such length that Congress *intended* the 1957 Amendments to be, not the minimum, not the maximum, but the sole standard of jury selection."
>
> *Rabinowitz v. United States,* 366 F. 2d 34, 72 (5th Cir. 1966)

> "At every step there is a continuing demand for selective judgments. While in making them it may be assumed that as to individuals chosen they

are required nominally to have only the qualifications prescribed in the 1957 Act, the fact is otherwise. To those must be added all of the other measuring tests to assure the fair community cross section. This means that whatever Congress might have thought it was doing, it did not, it could not, dispense with these additional judgmental standards by which out of hundreds of thousands, or occasionally a million or more names, the very, very tiny group comprising the box is selected.

• • •

"There is a place therefore—indeed, the Constitution assures a place—for levels of intelligence above the marginal minimum literacy test. Thankfully, the Constitution rescues the judicial structure from the ironic assumption that the law cannot search for or try to get the sort of intellectual preparation for deciding today's complex controversies."

Rabinowitz v. United States, ibid at pgs. 73, 74

At the end of the above-quoted portion of Judge Brown's opinion he cites in a footnote the following portion of the 1959 Report of the Judicial Conference Committe on the Operation of the Jury System:

"In order that grand and petit jurors who serve in United States District Courts may be truly representative of the community, the sources from which they are selected should include all economic and social groups of the community. The jury list should represent as *high a degree of intelligence, morality, integrity, and common sense as possible.*" (Judge Brown's Emphasis)

This is not to say that juror suggestors may exclude racial or other groups under the pretext of considering "intelligence, morality, integrity, and common sense." Any outright equation of "intelligence" with a higher education or wealth, of "morality" with a specific religious persuasion, of "integrity" with political persuasion or of any other personal attribute with membership or non-membership in a cognizable group would constitute a deviation from the spirit of the statute. In view of this, the Court has studied carefully the seventy-nine interviews of juror suggestors which have been submitted in evidence and it finds no such illegal equation in the minds of the juror suggestors. While some suggestors spoke of "education", it was clear that most of those who considered this factor suggested several persons with less than a high school education and of those who spoke of considering intelligence made it clear by other statements that education was not the sole criterion for such consideration. While a substantial percentage (but not a majority) of the suggestors stated that they selected "outstanding citizens" and a few stated that they selected "prominent citizens", they also made it clear that these outstanding and prominent citizens included carpenters, filling station attendants and persons from all walks of life. Space will not permit a detailed summary of these interviews, and the Court necessarily must be anecdotal in recording its impression resulting from its study of these interviews. Suffice it to say that the Court concludes from the evidence before it that the juror suggestors in this district, the vast majority of whom are elected public officials or public administrators, have demonstrated that adherence to democratic ideals which is to be expected of them in their public

functions and the cross-section of the community which has been achieved by their suggestions redounds to their personal credit.

The only question which remains is that of whether there is any illegality to be found in the fact that qualified citizens necessarily were precluded from consideration if they were not known to juror suggestors. As the Court has noted before, this particular theory of the defendants amounts to saying that the juror suggestor or "key-man" system is illegal per se. In disposing of this question, it need only be noted that the 1959 Report of the Judicial Conference Committee on the Operation of the Jury System noted the widespread use of the "key-man" system and found it acceptable:

> "The key-man system is the most widely used and if the key-men are selected with discretion and a view of securing diversification, it is productive of generally good results."
>
> 26 *Federal Rules Decisions*, 470.

In view of the foregoing, the Court concludes as a matter of law that the juror selection system used in this district is not illegal in its design, its execution or its results. In so concluding, the Court does not say that the system is perfect or even near-perfect or that a better system might not be devised. Advances in the fields of sociology, demography and other technologies might well make it feasable to have a completely random system of juror selection while the ever-increasing work load of this Court and the concomitant need for a greater and greater number of jurors together with the gradual alienation of individuals and the decreasing number of persons ac-

quainted with a cross-section of the community which may well be resulting from the constantly increased mechanization of our civilization might well render the juror-suggester system impractical in the future. The Court recently has recommended that the Jury Commissioners consider some possible changes in the system of juror selection, but this recommendation results not from past or present circumstances, but from what the future is likely to bring. The recent addition of another judge to this Court is one of many factors that may result in a change in the system in the very near future and such changes are in no way to be construed as an adverse judgment upon the system we are leaving behind. As of the time of the rendering of this decision, the evidence before the Court shows clearly that the present system is well within all of the Constitutional and statutory requirements.

/s/William E. Steckler
Judge, United States District Court

Dated: February 9, 1967"

END OF ENTRY

The foregoing entry and ruling was made by William E. Steckler, Judge of the United States District Court for the Southern District of Indiana, Indianapolis Division.

The petitioner did not have in his petition for certiorari or his prior appeal briefs any challenge to the jury selection system. However, at that time the petitioner did not have the benefit of the District Court's ruling.

It is true that the ruling and entry thereon is adverse to the petitioner's position. Nevertheless, the entry shows on its face that the jury selection system used was illegal and improper and violated the statutory system, notwith-

standing the ultimate decision of the District Court that the jury selection system as used in that district was valid and proper.

On December 18, 1964 the defendant-petitioner was indicted in the instant case. He was later indicted in another case, the aforementioned case, No. IP 66-CR-133, on August 12, 1966. Petitioner asks this court to take judicial notice of the evidence and records submitted in Cause No. IP 66-CR-133 which, as stated, is now pending. The evidence and records submitted were in a motion to dismiss filed by the defendant-petitioner wherein a hearing was had on the jury selection system. The evidence and the records show that in the Southern District of Indiana there has been no change in the jury selection system over the past ten years prior to the July 20, 1966 *Rabinowitz* decision in the case of *Joni Rabinowitz v. United States* of *America,* No. 21345 in the United States Court of Appeals for the Fifth Circuit.

The jury selection system used in the instant cause wherein the defendant Duke was indicted on December 18, 1964 was and is the same jury selection system used wherein the defendant Duke was indicted in a different cause on August 12, 1966. There can be no dispute of this. The evidence and the records are clear that there has been no change in the jury selection system in the past ten years in the Southern District of Indiana until approximately two months after the *Rabinowitz* decision was made on July 20, 1966. The records and evidence in the separate and different cause which is now pending in the Southern District of Indiana, Indianapolis Division in Cause No. IP 66-CR-133 show absoutely that there was the same jury selection system being used in the time period of December 18, 1964 and in the time period of August 12, 1966.

The Clerk of the United States District Court for the Southern District of Indiana, Robert Newbold, testified in said cause No. IP 66-CR-133 at the hearing of January 10 and 11, 1967 that he had been appointed clerk January 1, 1955 and that there was no substantial change in the jury selection system during that period of time that he was clerk. That during this period of time that they used suggestors, or key men to aid them in selecting jurors.

The entry by Judge Steckler states the following:

> "It also must appear that the system is calculated in its design to produce a juror list which constitutes a cross section of the community and that where jurors are recommended instead of drawn at random, it must appear that the suggestors as a whole are acquainted with a cross section of the community."

Therefore, it appears to this petitioner that Judge Steckler's ruling conflicts with the *Rabinowitz* decision. It is the petitioner's position that the jurors must be drawn at random and where the jurors are not drawn at random and suggestors, or key men are used one does not get a cross section of the community. The entry also contains a letter from the Clerk and the Jury Commissioner to the key men, or jury suggestors which states that they should choose capable and impartial jurors—good jurors—and persons in your judgment who would make qualified jurors. This then goes beyond the statute, Title 28, United States Code, Sections 1861 and 1862. This permits the suggestor, or key man to substitute his judgment of who or what a good juror is. How does he decide who is capable and impartial? As the entry states, the Court had before it a narrative summary of seventy-nine interviews

of the juror suggestors or key men that had been used to aid the Jury Commissioner and Clerk in selecting prospective jurors in the Southern District of Indiana.

Some of these key men or suggestors according to these records stated that they tried to select jurors who were prominent or had made something of themselves.

A former United States Attorney and a former Assistant United States Attorney testified that the federal jurors in this district were in the upper stratum of society as to both social and economics. There is no question that this resulted in blue ribbon juries and that this system resulted in the higher income and more educated persons sitting on these federal juries.

The defendant Duke is a negro. While mathematically the government could show a representation of negroes; some of the key men or suggestors didn't even know any negroes. Also negroes were not represented equally in the higher incomes of the juries.

The Court entry shows and states that two of the juror suggestors regarded women as inferior jurors and also points out that only five of the seventy-nine suggestors were women. The Court found that the jury list did not contain a statistical cross section from the standpoint of sex. Further the Court held that there was no question that all persons who did not happen to be acquainted with those persons who happened to be selected as juror suggestors were, for all practical purposes, effectively precluded from jury service. The Court pointed out further that this, of course, would be the case with any "key-man" or juror suggestor system and this alleged exclusion or preclusion presents the legal question of whether the "key-man" or juror suggestor system is illegal per se. We believe that any system is illegal where

you have to know a juror suggestor in order to sit on a federal jury. It is also illegal when there is any discrimination against women as is virtually conceded in the Court's entry. Where there has been this discrimination against women jurors, as here, then you certainly do not have a cross section as set out in the statute. The entry also virtually concedes that the suggestors, or key men consider such things as intelligence and common horse sense in selecting the prospective jurors. These qualifications are not mentioned in Title 28, United States Code, Section 1861.

CONCLUSION

There can be no question that at the time of the indictment in the instant cause on December 18, 1964 and at the time of the indictment of August 12, 1966 in the aforementioned cause that the jury selection system in the Southern District of Indiana was in conflict with the *Rabinowitz* decision.

It is true, as stated heretofore, that the above decision by Judge Steckler on the jury selection system was rendered approximately one month after the petitioner filed his petition for certiorari. Petitioner feels this is an intervening cause and feels further that the decision by Judge Steckler is in error. The entry shows on its face that the jury selection system in the Southern District of Indiana has not followed the statutes, Title 28, United States Code, Sections 1861 and 1862 and has not resulted in a fair cross section as set out in the statutes and in the *Rabinowitz* decision.

WHEREFORE, petitioner prays that a rehearing may be granted to the end that the Order denying the Petition For Writ of Certiorari may be set aside and the said petition be granted.

Respectfully submitted,

/s/ Robert H. Van Brunt
ROBERT H. VAN BRUNT
Attorney for Petitioner

IN THE
SUPREME COURT
OF THE UNITED STATES

NO. 948

BOOKER T. DUKE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

CERTIFICATION

Robert H. Van Brunt does hereby certify that he is the Attorney for the petitioner and does further certify that the petition for rehearing filed in this cause is presented in good faith and not for delay and is restricted to the ground specified in Rule 58(2) of the Rules of the Supreme Court, to-wit a substantial ground available to petitioner though not previously presented. Also one intervening circumstance of substantial effect.

Under Rule 58(1) of the Rules of this Court, this petition is due to be filed not later than March 17, 1967. The petitioner is now in the custody of the Marshal of the United States.

Respectfully submitted,

/s/ Robert H. Van Brunt
ROBERT H. VAN BRUNT
Attorney for Petitioner